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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: Comments on Petition of the Wireless Consumers Alliance, Inc., WT 99-263

To Whom It May Concern:

Enclosed are the comments of Public Citizen on the Petition of the Wireless Consumers Alliance, Inc. for a declaratory ruling on whether courts are precluded by the preemptive effect of the Communications Act from awarding monetary relief against commercial mobile radio service providers for the violation of state consumer protection laws and/or in connection with contract disputes or tort actions involving CMRS providers.

Sincerely yours,

Alison Van Horn

Alison Van Horn

cc: Susan Kimmel
Policy Division, Wireless Telecommunications Bureau
Federal Communications Commission
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FEDERAL COMMUNICATIONS COMMISSION
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Comments Of Public Citizen, Inc. On The
Petition Of The Wireless Consumers Alliance, Inc., WT 99-263

Public Citizen submits these comments in support of the petition of the Wireless Consumers Alliance, Inc. ("WCA Petition") for a declaratory ruling that courts are not precluded by the preemptive effect of the Communications Act, 47 U.S.C. § 332(c)(3)(A), from awarding monetary relief against commercial mobile radio service ("CMRS") providers for the violation of state consumer protection laws and/or in connection with contract disputes or tort actions involving CMRS providers. Public Citizen is a non-profit consumer advocacy group with over 150,000 members nationwide. Public Citizen Litigation Group attorneys have represented plaintiffs in state law actions for monetary relief in which defendants have argued that the plaintiffs' claims were preempted by federal statute. See, e.g., Medtronic Inc. v. Lohr, 518 U.S. 470 (1996); Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996). The Litigation Group has also been involved with preemption issues both before Congress and government agencies. Public Citizen is filing these comments because of the potentially devastating impact that a decision finding preemption in these circumstances would have on consumers.

Introduction

Section 332(c)(3)(A) of the Communications Act provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." The CMRS industry reads Section 332(c)(3)(A) as carte blanche to lie and deceive consumers. In numerous cases alleging fraud and breach of contract with respect to the advertising and billing practices of CMRS providers, the industry has defended itself by asserting that, despite what it says, Section 332(c)(3)(A) preempts state law claims seeking monetary relief because an award of damages for injuries caused by its fraud, deceit, or misleading advertisements and business practices is rate regulation. However, the ordinary meaning of the language of Section 332(c)(3)(A) does not support that argument, and there is no evidence that Congress had the purpose that the industry seeks to attribute to it -- to create industry immunity for consumer fraud.

The starting point for any analysis of the preemptive scope of Section 332(c)(3)(A) is the presumption against preemption. See Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."). That presumption requires that, unless Congress made its intent to preempt, or the scope of that intent, "clear and manifest," state law retains its efficacy; that is, there is no preemption. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); see also Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517-18 (1992). Here, an analysis of the text and legislative purpose of Section 332(c)(3)(A), as well as the savings clause of the Communication Act, 47 U.S.C. § 414, confirm that Section 332(c)(3)(A) means precisely what it says -- its preemptive scope is limited to state rate and entry regulation, and state law actions for monetary relief are beyond its purview.

Section I below discusses the source and meaning of the presumption against preemption. Section II provides a phrase-by-phrase textual analysis of Section 332(c)(3)(A), showing that there is no indication that Congress intended to preempt state law actions for monetary relief. Section III briefly reviews the history and purpose of Section 332(c)(3)(A) and the structure of the Communications Act, all of which support the conclusion that state law claims for monetary relief are beyond the preemptive domain of Section 332(c)(3)(A).

I. The Presumption Against Preemption

Preemption and the presumption against it have their origins in the Constitution of the United States. The doctrine of preemption is based on Article VI, Clause 2 (the "Supremacy Clause"). The Supremacy Clause states that federal law is the supreme law of the land and that state judges are bound by federal law notwithstanding the law of any state. The presumption against preemption is rooted in the principles implicit and explicit in the Constitution that restrict the otherwise sweeping language of the Supremacy Clause and provide for a federal government of enumerated powers. In particular, the Tenth Amendment reserves to the states all of the powers not delegated to the federal government or prohibited by the Constitution. Given this constitutional imperative of federalism, the Supreme Court's Supremacy Clause jurisprudence has been "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

The presumption against preemption is not a mere platitude or precedential idiosyncracy. As confirmed in a recent Executive Order, it is a critical component in the federal-state balance that is fundamental to our constitutional plan. See Executive Order 13132 (August

4, 1999); see also Hillsborough County, Florida v. Automated Med. Lab., Inc., 471 U.S. 707, 715-719 (1985); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Our system of federalism demands that federal interference with a state's policy decision, such as the decision to give citizens tort and contract remedies, is the product of a considered judgment and a careful balancing. The presumption checks inadvertent or unpremeditated expansions of federal authority by reserving power to the states, unless the federal government has made it unmistakably clear that it intends to displace state law. See Betsy Grey, "Make Congress Speak Clearly: Federal Preemption of State Tort Remedies," 77 B.U.L. Rev. 559, 627 (1997) (presumption against preemption "ensures that [Congress's] decision to preempt is the product of a deliberate policy choice . . . rather than an unintended result of congressional inattention or imprecision.").

Therefore, a party seeking the preemption of state law bears a heavy burden. The strong presumption against preemption may be overcome only by "clear evidence" of a congressional intent to the contrary. Executive Order 13132 (August 4, 1999), Sec. 4(a). Put differently, "[p]reemption of state law by federal . . . regulation is not favored 'in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)). Thus, the analysis of Section 332(c)(3)(A) must begin with the assumption that Congress did not intend to interfere with the states' policy decisions to give their citizens remedies for the violation of tort, contract and consumer protection laws. As explained in detail below, an examination of the text and purpose of Section 332(c)(3)(A) and the structure of the Communications Act supports that assumption. There is simply no indication in Section 332(c)(3)(A), nor any suggestion in its legislative history, that Congress intended to preempt state law monetary actions against CMRS providers for their breaches of contracts or acts of consumer fraud.

II. Textual Analysis Of Section 332(c)(3)(A)

Each relevant phrase in Section 332(c)(3)(A) shows that Congress did not preempt a state court's ability to award monetary relief for a CMRS provider's violation of state tort, contract, or consumer protection law. As explained in detail below, in ordinary English, the terms "State or local government," "authority to regulate," and "the entry of or rates charged" refer most naturally to the regulatory enactments of legislative bodies or administrative agencies and do not reasonably include a court's award of monetary relief to a tort or contract plaintiff. To construe such an award as rate or entry regulation would be at odds with the Supreme Court's oft-stated "assumption that the ordinary meaning of th[e statutory] language accurately expresses the legislative purpose." Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985).

A. "No State Or Local Government"

Section 332(c)(3)(A) provides that no "State or local government" has authority to regulate entry and rates. Although a judicial decision is state action for some purposes, cf. Shelley v. Kraemer, 334 U.S. 1 (1948), that does not suggest that the ordinary meaning of "State or local government" includes judges and juries. In common parlance, one would not describe a civil jury -- whose principal functions are to assess liability and apply the law -- as a unit of a state or local government. Likewise, that description would be a very unusual way to refer to a judge. In fact, the U.S. Solicitor General argued as much in a 1997 Supreme Court brief filed in

Lewis v. Brunswick Corp., No. 97-288. Lewis presented the question of whether the express preemption clause of the Federal Boat Safety Act, 46 U.S.C. § 4306 -- which was directed at the actions of a "State or political subdivision of a State" -- preempts common-law damages claims. In arguing for a no-preemption ruling in Lewis, the United States relied, among other things, on the fact that "a court in a common law damages action would not normally be thought of as a 'State or political subdivision of a State.'" Brief for the United States as Amicus Curiae in Lewis, No. 97-288 (U.S. filed Dec. 1997), 1997 WL 799992, at *18.

Furthermore, many consumer protection, tort, and contract cases could be filed in or removed to federal court on the basis of diversity of citizenship. Certainly, the decision of a federal judge or a federal jury to award montary relief is not the action of a state or local government.

The Supreme Court's decision in Gregory v. Ashcroft, 501 U.S. 452 (1991), is closely analogous in this regard and provides significant additional support for the argument against preemption. The issue in Gregory was whether state judges were "employee[s]" within the meaning of the Age Discrimination in Employment Act ("ADEA") and therefore could not be forced to leave the bench at age 70, as the Missouri constitution requires. The Court recognized that the term "employee" was expansive and that the language upon which Missouri chiefly relied -- the ADEA's exemption for state "appointees on the policy-making level" -- would be "an odd way for Congress to exclude judges." Gregory, 501 U.S. at 467. However, the Supreme Court held that, in light of the presumption against preemption, for the ADEA to override Missouri law, "it must be plain to anyone reading the Act that judges are included." Gregory, 501 U.S. at 467. Thus, because the ADEA's text was "ambiguous," and did not plainly include judges, the ADEA was held not to preempt the Missouri provision at issue. Gregory, 501 U.S. at 467. Here, the most natural reading of the reference to a "State or local government" is that it does not include monetary awards of state (or federal) courts. Even if there were ambiguity, Gregory would require that doubt be resolved against preemption.

B. "Authority To Regulate"

Section 332(c)(3)(A) denies a state "authority to regulate." In common parlance, one simply does not speak of a state court's ability to issue monetary relief as "authority to regulate." The term "regulate" most naturally refers to activity undertaken by state legislatures and administrative agencies, not actions for monetary relief. See Cipollone, 505 U.S. at 519. Congress' use of the phrase "authority to regulate," instead of a broader term -- such as "enacting or enforcing any law, rule, regulation, standard, or other provision having the force and effect of law," used in the Airline Deregulation Act of 1978 (the "ADA"), 49 U.S.C. Appx. 1305(a)(1), or "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State," used in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), (c)(1) -- evinces its intent only to preempt states and local governments from prescribing rates and entry rules. Indeed, the Supreme Court observed as much when construing the ADA's preemption provision in Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992). It noted that, if Congress had wanted more limited preemption, "it would have forbidden the States to 'regulate rates, routes, and services,'" Morales, 504 U.S. at 385 (emphasis in original), the very term that it used in Section 332(c)(3)(A).

That Section 332(c)(3)(A) applies only to regulatory enactments, and not to state law monetary liability, is underscored when it is read in conjunction with Section 332(c)(3)(B).

Section 332(c)(3)(B) provides that "[i]f a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates." This provision is analogous in scope to Section 332(c)(3)(A)'s preemption provision; it allows the Commission to exempt from preemption any existing rate regulation that would otherwise be preempted by Section 332(c)(3)(A). Obviously, the type of "regulation[s]" referred to in Section 332(c)(3)(B) are state statutes and administrative rules since it is nonsensical to suggest that a state would need to file a petition and obtain permission from the FCC before its courts could redress consumer fraud claims against CMRS providers. Moreover, Section 332(c)(3)(B)'s use of the term "in effect" in connection with a state's rate regulation confirms that Section 332(c)(3)(A)'s reference to regulation does not include monetary awards. Although a monetary award in a tort or contract case would represent confirmation of a pre-existing duty, only an inept grammarian would describe such an award as a regulation "in effect." On the other hand, it is natural to speak of the regulatory enactments of an administrative or legislative body, which operate prospectively, as being "in effect."

The fact that monetary awards may have an incidental regulatory effect is insufficient to bring them within the scope of Section 332(c)(3)(A)'s prohibition against regulation. The Supreme Court has repeatedly and emphatically rejected the equation of state claims for monetary relief with state regulatory law. In addition, a monetary award against a CMRS provider who has violated tort, contract or consumer protection laws does not interfere with the federal policies of the Communication Act.

For instance, in Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 250 (1984), the Supreme Court acknowledged that state law directly "regulating the safety aspects of nuclear development" was preempted by federal law, but held that the plaintiff's state damages action concerning injuries sustained from radiation at an unsafe nuclear plant was not. In so ruling, the Court looked to Congress's enactments in the atomic energy field, and noted that Congress had preempted state regulatory law, even though it had left state damage remedies in place:

> [I]t is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

Silkwood, 464 U.S. at 256 (emphasis added).

The Supreme Court made a similar point in another case involving atomic energy. In Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988), the Court considered whether a state could use more stringent standards than those imposed by federal nuclear safety regulations as a trigger for making supplemental workers' compensation awards. The Court acknowledged the exclusive federal control over direct regulation of nuclear plant safety, but nevertheless held:

> The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that incidental regulatory pressure is accepted, whereas direct regulatory authority is not.

Goodyear Atomic, 486 U.S. at 185-86 (citing Silkwood, 464 U.S. at 256) (footnote omitted). The Supreme Court has come to the same conclusion in other contexts as well. See Cipollone, 505 U.S. at 521 (finding that "[t]here is no general, inherent conflict between [express] federal preemption of state [regulatory] requirements and the continued vitality of state common law damages actions" and holding that Federal Cigarette Labeling and Advertising Act of 1965 preempted only enactments of state regulatory bodies, and not state damages actions); English v. Gen. Elec. Co., 496 U.S. 72, 85 (1990) (holding that indirect regulatory effect of common-law damages action not great enough to put it within preempted domain); California v. Arc Am. Corp., 490 U.S. 93, 105 (1989) ("Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law") (citing Silkwood, 464 U.S. at 257-58); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 50 (1987) (holding that the provision excepting any state law which "regulates insurance" from ERISA's preemptive force did not include state common law because "[a] common-sense view of the word "regulates" would lead to the conclusion that in order to regulate [an industry], a law must not just have an impact on [that] industry, but must be specifically directed toward that industry."); Nader v. Allegheny Airlines, 426 U.S. 290, 300 (1976) (holding that any "impact on rates that may result from the imposition of tort liability . . . would be merely incidental.").[1]

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[1]The CMRS industry relies on San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), for the proposition that state court monetary awards may constitute state regulation. However, in San Diego, unlike here, there was no express preemption provision, and thus the Court was not construing the word "regulation." Rather, the issue was whether a state court could exercise jurisdiction over a claim based on activities that were subject to the National Labor Relations Act, but over which the National Labor Relations Board had declined to exercise jurisdiction. Finding that Congress considered centralized administration of the specially designed procedures of the Board necessary to obtain uniform application of its substantive rules, the Supreme Court held that Congress had displaced state power over areas of activity that were

Any attempt to equate tort, contract and consumer protection monetary liability with regulatory law demonstrates a fundamental misunderstanding of the difference between the indirect effect of a monetary verdict on a person's behavior and the direct regulatory effect of a statute or regulation that imposes requirements on a person's actual conduct. Although a monetary award by its very nature attaches additional consequences to a person's conduct, no particular course of action is required. A defendant found liable on, for example, a fraudulent advertising claim may respond in a number of ways. It may decide to accept such an award as a cost of doing business and not alter its behavior in any way. See Goodyear Atomic, 486 U.S. at 185-86. Or, by contrast, it may choose to avoid future awards by publishing alternative advertisements. The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of tort and contract law from legislative and administrative regulations. Moreover, tort and contract law have an entirely separate and additional function -- compensating victims -- that sets them apart from direct forms of regulation. See Cipollone, 505 U.S. at 536-37 (Blackmun, J., dissenting).

Under the Communications Act, the FCC, acting pursuant to congressional delegation, made a deliberate decision to forego rate and entry regulation, thereby permitting the

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subject to the National Labor Relations Act, even where the Board had failed to determine the status of the disputed conduct for some reason, such as, where it declined to exercise jurisdiction. See San Diego, 359 U.S. at 245-46. The Supreme Court explained that, because under the National Labor Relations Act state power in the form of adjudication conflicted with federal policy to the same extent as any positive restraint, state courts were precluded from granting any remedy -- equitable or monetary. See San Diego, 359 U.S. at 238, 246. It was in that context that the language relied upon by the industry -- that state regulation may be exerted through an award of damages -- occurred. Here, as explained in the text below, state power to adjudicate and vindicate violations of tort, contract and consumer protection laws does not conflict with congressional policy as expressed in the Communications Act.

market to determine the rates charged by CMRS providers. In light of that decision, Section 332(c)(3)(A)'s preemption provision -- forbidding a state from regulating rates, which would thereby require a particular course of action that the FCC has decided should not be required -- is consistent with the decision that the FCC alone should impose (or not impose) positive regulatory rate requirements. A monetary award, however, does not require a CMRS provider to meet a different standard than that set by the FCC -- it may still charge the market rate. The verdict only requires the CMRS provider to pay damages to individual plaintiffs injured by its violation of state tort, contract and consumer protection law. Put differently, under Section 332(c)(3)(A), the scope of the prohibition of state regulation is measured by the scope of the federal regulation that was foregone. There is no federal authority over traditional laws of tort, contract and consumer protection that are within the domain of the states. Thus, Section 332(c)(3)(A) is best read as having superseded <u>only</u> enactments by state legislatures or administrative agencies that mandate particular rates or entry rules.

C. "The Entry Of Or The Rates Charged"

The narrow breadth of Section 332(c)(3)(A)'s preemptive reach is also apparent from the phrase "the entry of or the rates charged." A common sense understanding of the term "rates charged" does not include state law actions for monetary relief. As discussed in the WCA Petition, that term ordinarily applies only to the prescription, setting or fixing of prices, which involves a complex regulatory process that is entirely different from the adjudication of state law tort, contract, and consumer protection liability against CMRS providers. <u>See</u> WCA Petition, pp. 12-14. Such cases do not involve "the rates charged" by CMRS providers under any reasonable interpretation of that term. For example, the case underlying the WCA Petition revolves around a CMRS provider's allegedly false claim -- made to induce purchases by consumers who desire continuous access to 911, for example, as a means of ensuring their safety and security -- that it offers a "seamless calling area" throughout Southern California. If Congress had such claims in mind when drafting Section 332(c)(3)(A), it would have preempted more than the regulation of "the entry of or the rates charged."

In considering the language of Section 332(c)(3)(A), it is important to note what Congress did not do: Congress did not explicitly refer to state claims seeking monetary relief in defining the scope of preemption, even though it has done so in other statutory preemption provisions. As one court put it in construing a preemption provision in the Federal Boat Safety Act: "An additional factor militating against reading the [preemption] provision so broadly is that in other enactments Congress has explicitly referred to state common law when it meant to include it within the scope of a preemption clause." Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246, 250 (Tex.), cert. denied, 513 U.S. 1057 (1994).

Had Congress desired to express a broader preemptive purpose, it could have preempted "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, . . . or services," as it did in the ADA, 49 U.S.C. § 1305(a)(1).[2] It could have preempted "any and all State laws insofar as they may now or hereafter relate to any" rates and services, as it did in ERISA, 29 U.S.C. § 1144(a). Or, it could have preempted any "State constitution, statute, court decree, common law, rule, or public policy limiting or prohibiting" rates and services, as it did in the Domestic Housing and International Recovery and Financial

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[2]Even in the context of the ADA's preemption provision, courts have recognized that claims based on traditional state tort law are not preempted. See, e.g., Charas v. TWA, 160 F.3d 1259 (9th Cir. 1998).

Stability Act, 12 U.S.C. § 1715z-17(d), -18(e) (1989). See also Copyright Act of 1976, 17 U.S.C. § 301(a) (1977) (preempting rights "under the common law or statutes of any State").

Instead, Congress chose to preempt only "the entry of or the rates charged." Its choice of phrase is remarkable for the absence of any inclusive language. Congress chose not to prohibit "any and all State laws" or "any law, rule, regulation, standard, or other provision having the force and effect of law." It chose not to preempt regulations "related to" rates and entry. Rather, it chose restrictive language, which does not permit much, if any, interpretation. As such, the language evinces a narrow preemptive purpose on the part of Congress. Because the narrow scope of federal preemption is explicit in the language of Section 332(c)(3)(A), it is impossible to divine a "clear and manifest purpose" on the part of Congress to include state law actions for monetary relief within Section 332(c)(3)(A)'s preemptive scope.

D. The Exception Clause

Section 332(c)(3)(A)'s exception provides further textual support for the conlcusion that state law monetary actions are beyond its scope. After describing its preemptive reach, Section 332(c)(3)(A) sets forth a broad exception, or anti-preemption clause: "except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service providers." Once again, this provision uses the term "regulating," and thus, plainly refers to state regulatory enactments -- not state law monetary liability. Even if state monetary actions could be squeezed within the ambit of Section 332(c)(3)(A), as a matter of ordinary English, monetary awards for tort and contract violations fit far more comfortably within the realm of "other terms and conditions" regulation than entry and rate regulation. See WCA Petition, pp. 13-14.

III. Legislative History And Structure Of The Act

In light of the clarity of Section 332(c)(3)(A), it is not necessary to consult its legislative purpose or other aspects of the Communications Act to buttress the conclusion that state claims for monetary relief are not preempted by it. See Cipollone, 505 U.S. at 517. Moreover, the strong presumption against preemption of state law requires that, even if there were any ambiguity concerning section 332(c)(3)(A)'s applicability to monetary actions, the preemption issue must be resolved against preemption. Nevertheless, in order to dispel any doubt, the legislative purpose of Section 332(c)(3)(A) and the structure of the Communications Act are briefly analyzed because they strongly confirm the no-preemption conclusion.

A. Legislative Purpose Of Section 332(c)(3)(A)

Congress' purpose in enacting Section 332, as reflected in the legislative history, was to promote the growth and development of the CMRS industry for the benefit of consumers by subjecting the industry uniformly to competitive market forces while preserving consumer protections at the state level. Before the 1993 amendments to the Communications Act, common carriers had been subject to state rate and entry regulation, but private carriers, which had become functionally indistinguishable from common carriers, were exempt from such regulation. See H.R. Rep. No. 103-111, at 260 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 587. Concerned that the "disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protections they need" if new services were classified as private, Section 332(c)(3)(A) was enacted to eliminate the inconsistency in state rate and entry regulation with respect to common carriers and private carriers by prohibiting state regulation. At the same time, Congress enabled a state to regulate the other terms and conditions of service. Consumer protection matters were expressly excluded from the preemptive effect of the prohibition against state rate and entry regulation by the phrase "other terms and conditions" in the anti-preemption clause: "By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters." H.R. Rep. No. 103-111, at 260-61 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 587.

It is inconceivable, in light of Congress' intent to benefit consumers by enabling market forces to determine the rates charged by CMRS providers, and to preserve the states' authority to regulate other consumer protection matters, that Congress intended to obliterate in one fell swoop, without even mentioning state law monetary liability, the protections provided by the states' tort, contract and consumer protection regimes, particularly in view of the fact that the Communications Act does not afford any damages remedy of its own. Indeed, where the preemption of state law claims would leave uninjured individuals without a state or federal remedy, the Supreme Court has been very reluctant to ascribe preemptive intent to Congress. See Medtronic, 518 U.S. at 487 (finding it "'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct' and it would take language much plainer than the text of [the preemption provision of the Medical Device Amendments of 1976] to convince us that Congress intended that result.") (quoting Silkwood, 464 U.S. at 251); English, 496 U.S. at 87-90.

Moreover, state laws requiring a CMRS provider to internalize the costs of its breaches of contracts, fraudulent advertising, or other deceptive practices are entirely consistent with the FCC's regulatory determination that CMRS providers should be permitted to charge market rates. Section 332(c)(3)(A) was designed to promote the industry's reliance on competitive market forces. The stability and efficiency of the market, however, fundamentally depend on the enforcement of state contract, tort, and consumer protection laws. The Supreme Court has observed in the preemption context that "[m]arket efficiency requires effective means to enforce private agreements." Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 230 (1995) (citing Farber, Contract Law and Modern Economic Theory, 78 Nw. U. L. Rev. 303, 315 (1983) (remedy for breach of contract "is necessary in order to ensure economic efficiency"); R. Posner, Economic Analysis of Law 90-91 (4th ed. 1992) (legal enforcement of contracts is more efficient than a purely voluntary system)). Like contract principles, prohibitions against unfair or deceptive practices in commerce are entirely consistent with a free market in which rates are not regulated by government decree. The standard of ordinary care and the duty to refrain from committing fraud in commercial dealings are general background rules against which all individuals order their affairs and upon which a competitive market depends. These duties fall no more heavily on CMRS providers than on any other business. Thus, their enforcement through a monetary remedy is wholly compatible with a free market.

In short, there is absolutely no indication in the text or the legislative history that Congress wished to insulate CMRS providers from longstanding state monetary liability rules governing deceptive advertising or fraudulent business practices.

B. The Savings Clause

If the foregoing review of Section 332(c)(3)(A)'s language and purpose were not enough to demonstrate that monetary awards against CMRS providers for tort, contract, and consumer protection law violations were not expressly contemplated by Congress, the

Communication Act's "savings clause" eliminates any doubt. That clause provides: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. The savings clause is an anti-preemption provision that expressly preserves state common law and statutory remedies. Thus, it rejects preemption in precisely the context in which the CMRS industry generally seeks immunity via preemption, i.e., in state actions seeking monetary relief. Moreover, the savings clause is -- in marked contrast to Section 332(c)(3)(A)'s preemption provision -- all-inclusive. It states that "nothing" in the chapter shall "in any way abridge or alter" existing remedies. As a result of a savings clause's clarity and breadth, courts have overwhelmingly rejected the preemption of state claims for monetary relief. See WCA Petition, p. 15 n. 28 (listing cases).

Conclusion

In sum, an analysis of the structure of the Communications Act, in addition to the text and legislative purpose of the preemption provision, demonstrates that the Communications Act does not preempt state claims for monetary relief against CMRS providers for violations of consumer protection laws and/or in connection with contract disputes or tort actions. Any conclusion to the contrary would have a pernicious effect: sweeping immunity from state law suits for monetary relief, regardless of the magnitude of the defendant's misconduct or the severity of the consumer's injuries. Public Citizen therefore urges the FCC to issue a declaratory ruling that courts are not precluded by the preemptive effect of the Communications Act from awarding monetary relief against CMRS providers for the violation of state consumer protection laws and/or in connection with contract disputes or tort actions involving CMRS providers.

Respectfully submitted,

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